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International Law Situations with Solutions and Notes

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SITUATION II.

DECLARATION OF WAR.

The relations between the United States and State X are strained. The United States issues an ultimatum on July 1 to the effect that, if certain demands are not satisfied before July 10, war will exist from that date.

State X breaks off diplomatic relations with the United States on July 3 and announces that unless the demands of the United States are withdrawn before July 7 war will be declared on that date.

On July 8 a war vessel of the United States whose commander knows only that neither the United States nor State X has withdrawn its demands meets a merchant vessel of State Y which in case of war would be neutral. This vessel is known to be loaded with coal and is bound for a port of State X which, besides being a large commercial port, also contains a naval station.

What action should the commander take?

SOLUTION.

Unless exempt by treaty or otherwise the commander should send the merchant vessel of State Y to a prize court on the ground that the cargo was contraband of war if the vessel sailed with knowledge of the existence of the war.

If the vessel clearly had no knowledge of the existence of the war, he should consider that the cargo will probably be liable to expropriation rather than condemnation.

NOTES.

Historical.—It was in early times considered necessary that there should be some formal declaration of war. It was thought that a war should not be begun by what without State authorization might be regarded simply as a violent act of an individual. It was considered at one time that to commit an act of hostility before a public declaration of war would be perfidious.

It was the opinion in the eighteenth century that the State against which the war was to be waged and other States were entitled to demand that they be informed by a declaration of the purpose of a State to engage in war.

The Roman idea of a *bellum justum* involved a previous declaration. The ceremony of declaration was, however, a religious one and may have been rather to justify the war before the gods than before men.

The chivalry of the middle ages demanded a previous declaration and this was frequently formally carried to the ruler against whom the hostilities were to be waged. Such was the practice in the early part of the seventeenth century.

Grotius says that not only must a war to be just be waged by the sovereign authority, but it must be duly and formally declared. He distinguishes among wars allowing wars without declaration for the recovery of a State's own property or to ward off danger. He, however, maintains that in order to obtain the advantages flowing from the law of nations a declaration of war by one of the parties if not by both is essential. His treatise provides for the conditional declaration of war when it is conjoined with a demand for restitution. (De Jure Belli ac Pacis, Lib. III, cap. III.)

Bynkershoek in the early eighteenth century regarded declaration as the honorable method of entering on war, but not as absolutely essential, and before his period it had become more and more common for States to go to war without declaration. During the eighteenth century and the early nineteenth century the practice of declaration declined, and it was not till the latter half of the nineteenth century that there arose a movement in favor of declaration.

Maurice, in his book on "Hostilities without Declaration of War," covers the period between 1700 and 1870. Of 111 wars during this period he finds four formal declarations. Eleven declarations seem to have been made either formally or informally. In some instances diplomatic relations were broken off or some action involving an ultimatum was taken. A large number, perhaps

forty, seem to have been begun without declaration in order to take the enemy by surprise.

Since 1870 there have been thirty or more cases where States have resorted to arms. Some of these hostilities hardly deserve the dignity of the classification as wars. Domestic revolutions have often begun without declaration. The list includes:

Peruvian revolution, 1872.	Haitian revolution, 1888.
Carlist revolution, Spain, 1873.	Argentine revolution, 1890.
Balkan War, 1876.	Chilean revolution, 1891.
Russo-Turkish War, 1877.	Brazilian revolution, 1891.
Afghan War, 1879.	Venezuelan revolution, 1892.
Colombian revolution, 1879.	Hawaiian revolution, 1893.
Chile-Peru-Bolivian War, 1879.	British-African War, 1893.
Anglo-Boer War, 1880.	Chino-Japanese War, 1894.
Franco-Tunis campaign, 1881.	Italian-Abysinnian War, 1894.
Egyptian campaign, 1882.	Cuban revolution, 1895.
Haitian revolution, 1882.	Greco-Turkish War, 1897.
Tonquin campaign, 1882.	Spanish-American War, 1898.
Haitian revolution, 1883.	South African War, 1899.
Franco-Chinese War, 1884.	German-African War, 1903.
Servia-Bulgarian War, 1885.	Russo-Japanese War, 1904.
Burmese War, 1885.	

Of these, hostilities consequent upon internal revolutions would ordinarily not be declared nor would hostilities upon uncivilized tribes. But of the entire list there were only nine declarations, of which five might be considered preliminary.

Before 1907 *post facto* declarations were common; even the United States Congress, with which rests the power to declare war, declared on April 25, 1898, "that war exists and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain."

From this review of more than two hundred years it is evident that preliminary declarations were rarely issued during the eighteenth and nineteenth centuries.

Reasons for a declaration of war.—If war were simply a fact without legal consequences, there might be reasons why a declaration should not be regarded as necessary in all cases. War gives rise to certain legal consequences. The relations of citizens of the belligerent States to one

another are changed. The relations of citizens of belligerent and of neutral States are changed. The relations and obligations of the neutral States and of citizens of neutral States to the belligerents are changed. The neutral State is bound to prohibit certain actions ordinarily permitted. The citizen of a neutral State is liable to treatment which in time of peace would not be tolerated. A neutral State in time of war may not sell arms to a belligerent State. A neutral merchant vessel in time of war must tolerate visit and search and other restrictions upon her freedom.

The custom developed during the eighteenth and nineteenth centuries of dating the beginning of war from the date of the first act of hostilities, but in practice that was not easy to determine. The courts of different States have given different interpretations to the phrase "first act of hostilities." Indeed, the courts of one State have at different periods and in different cases given different interpretations to the phrase. When wars were mainly upon land and the interests and well-being of States not concerned in the hostilities were not greatly affected the necessity of a declaration of the time at which war existed or would exist was not so essential.

Moral obligation to declare war.—Prof. Westlake sets forth the moral obligation to make a declaration:

The wars between the continental powers in the seventeenth and eighteenth centuries were often commenced in fact before their declaration, and were sometimes carried through without any declaration, quite as a matter of course, without that confused reference to reprisals as a distinct institution, which helped to warp the thoughts and the conduct of the maritime powers. Thus on all sides the habit arose of regarding lawful war—that is, war with all its legal effects, as commenced no less by fact than by declaration, and dating it from the commencement of hostilities. By that term, if we try to put a definite meaning on it, we must understand the first act of force done with the intent of war and not with that of reprisals or pacific blockade, or the first act of force done with the intent of reprisals or pacific blockade if a war follows, or the first act of force done with whatever intent—self-defense, seizing what is called a material guarantee, or any other—which the State affected by it chooses to regard as one of war. Nor is it possible to refuse its legal effects to a state of war so entered on or to date its commencement as between the parties otherwise. But from

the point of view of political morality it can not be too strongly maintained that so serious a step as the entrance on a state of war ought not to be taken without the deliberation for which the only security approaching to adequacy is the necessity of expression. No power doing an act of force with the intent of war, nor any power treating as war an act of force done by another, is morally justified in omitting to accompany its conduct by some kind of declaration. Nor again is any power doing an act of force morally justified in not having a clear view whether it intends it as war or not. If an act of force affects third powers and they submit to it, deeming at the same time that it places them in the position of neutrals in war with neutral rights and duties, they can scarcely avoid stating the view which they take of the situation. (International Law, Part II, War, p. 22.)

Hague Convention, opening of hostilities.—The Second Hague Conference proposed and adopted a Convention Relative to the Opening of Hostilities. The Convention was ratified by the United States March 10, 1908.

The official French text is as follows:

ART. 1. *Les Puissances contractantes reconnaissent que les hostilités entre elles ne doivent pas commencer sans un avertissement préalable et non équivoque, qui aura, soit la forme d'une déclaration de guerre motivée, soit celle d'un ultimatum avec déclaration de guerre conditionnelle.*

ART. 2. *L'état de guerre devra être notifié sans retard aux Puissances neutres et ne produira effet à leur égard qu'après réception d'une notification qui pourra être faite même par voie télégraphique. Toutefois les Puissances neutres ne pourraient invoquer l'absence de notification, s'il était établi d'une manière non douteuse qu'en fait elles connaissaient l'état de guerre.*

Article 1 is as proposed by the French delegation at the Hague Conference of 1907 at the session of the second commission on June 22, 1907. This proposition was seconded by the Belgian delegation. The Belgian delegate pointed out the uncertainty of practice and opinion as to the necessity of a declaration of war before engaging in hostilities. The Netherlands delegate said, in the discussion before the second subcommission, on July 5, 1907:

II. "Convient-il"—est demandé ensuite—"que l'ouverture des hostilités soit précédée d'une déclaration de guerre ou d'un acte équivalent?"

Notre point de vue en cet égard est le même que l'Institut de droit international a exprimé dans sa session de Gand au mois de septembre de l'année passée.

Il est conforme aux exigences de l'esprit du droit international moderne, à la loyauté que les nations se doivent dans leurs rapports mutuels, ainsi qu'à l'intérêt commun de tous les Etats que les hostilités ne puissent commencer sans un avertissement préalable et non équivoque.

Pourquoi? Pour des raisons qui, selon moi, se trouvent sous la main.

On demande le désarmement. Pourquoi donc, ne commencerions-nous pas par ce qui est très-facilement à atteindre? Si cela ne mène pas directement et ostensiblement au but voulu, du moins cela contribuera indirectement à ce que les Etats n'aient pas autant besoin de rester armés en temps de paix, pour ne pas être pris à l'improviste.

De plus, pour tant de relations commerciales qui de nos jours se sont développées si extraordinairement, il importe que le moment où la guerre, qui bouleverse et change tout, a commencé, soit fixé et puisse être déterminé exactement.

III. À la troisième question: "Convient-il de fixer un délai qui devra s'écouler entre la notification d'un tel acte et l'ouverture des hostilités?" ma réponse est encore affirmative.

C'est pour cette raison que je me suis permis d'amender la proposition de la Délégation française avec laquelle je suis au reste d'accord.

Il me semble que dans une matière d'aussi grande importance que celle qui nous occupe, il est désirable de préciser et d'éviter les termes vagues.

Or, si l'on ne précise pas ce que l'on désire et veut atteindre avec le terme *avertissement préalable*, cet avertissement en peut être un, envoyé à l'adversaire une heure, même une demie-heure ou moins encore avant que les soldats passent la frontière. Il va sans dire que le *préalable* ne sert alors à rien.

Veut-on écarter les surprises, désire-t-on prévenir que l'avertissement ne devienne à cet égard qu'une simple forme, aime-t-on à contribuer au tranquille développement des relations pacifiques des peuples, alors il faut fixer un délai et mettre au moins un intervalle de 24 heures, et, comme il me semble que c'est bien le moindre qu'on puisse donner, j'aurai l'honneur de le proposer. (Deuxième Conférence Internationale de la Paix, Tome III, p 166.)

The *Comité d'Examen*, which considered the proposed rules, reported that the question of opening of hostilities without declaration had often led to recriminations on the part of the belligerents; that it was certainly expedient that there be some definite regulation. The two propositions were from France and the Netherlands, France proposing that there be a declaration prior to hostilities and the Netherlands that there be in addition a delay of

24 hours. It was decided that there ought to be a previous unequivocal declaration before the commencement of hostilities.

In the words of the *Comité d'Examen*—

La disposition principale, inspirée par une résolution de l'Institut de droit international (Session de Gand, septembre 1906), se justifie aisément. Elle prévoit deux cas distincts. Une difficulté surgit entre deux Etats: elle donnera ordinairement lieu à des négociations diplomatiques plus ou moins longues dans lesquelles chaque partie cherche à faire reconnaître ses prétentions ou tout au moins à obtenir une satisfaction partielle. L'accord ne se réalisant pas, l'une des Puissances peut déterminer dans un ultimatum les conditions qu'elle exige et dont elle déclare ne pas vouloir se départir en fixant un délai pour la réponse et en déclarant que, en l'absence de réponse satisfaisante, elle recourra aux armes. Dans ce cas, il n'y a aucune surprise et aucune équivoque. La Puissance à laquelle s'adresse un pareil ultimatum peut se décider en connaissance de cause, satisfaire son adversaire ou se préparer à combattre.

Le conflit peut surgir brusquement et une Puissance peut vouloir recourir aux armes sans tenter ou prolonger des négociations diplomatiques jugées inutiles. Elle doit alors avertir directement son adversaire de son intention et cet avertissement doit être non équivoque.

Quand l'intention de recourir aux armes est formulée conditionnellement dans un ultimatum, elle est forcément motivée, puisque la guerre doit être la conséquence du refus des satisfactions demandées. Il n'en est pas nécessairement ainsi quand l'intention de faire la guerre est manifestée directement et sans ultimatum antérieur. La proposition veut que l'intention soit aussi motivée dans ce cas. Un Gouvernement ne doit pas recourir à une résolution aussi extrême que la guerre sans la motiver. Il faut que tout le monde, dans les deux pays qui vont être belligérants comme dans les pays neutres, sache pourquoi l'on va se battre, afin qu'un jugement puisse être porté sur la conduite des deux adversaires. Sans doute, on ne saurait se faire l'illusion de croire que les véritables causes de la guerre seront toujours indiquées; mais la difficulté d'indiquer ces causes, la nécessité de mettre en avant des causes n'ayant rien de fondé ou en disproportion avec le fait même de la guerre, sont de nature à attirer l'attention des Puissances neutres et à éclairer l'opinion publique.

L'avertissement doit être préalable en ce sens qu'il doit précéder les hostilités. S'écoulera-t-il un certain temps entre la réception de l'avertissement et l'ouverture des hostilités? La proposition française ne fixe aucun délai, ce qui implique que les hostilités peuvent commencer dès que l'avertissement est parvenu à l'adversaire. La limitation de la guerre dans le temps est ainsi moins nettement déterminée que dans le cas de l'ultimatum. La Délégation française avait estimé que les nécessités de la guerre moderne ne permettent pas de demander,

à celui qui a la volonté d'attaquer, d'autres délais que ceux qui sont absolument indispensables pour que son adversaire sache que la force va être employée contre lui. (Ibid., Tome I, p. 132.)

Of the arguments in favor of a delay of 24 hours the *Comité* said:

On ne saurait nier la force de ces raisons qui n'ont cependant pas convaincu la majorité de la Sous-Commission. La fixation d'un délai n'a pas paru conciliable avec les exigences militaires actuelles; c'est déjà un progrès que d'avoir fait admettre la nécessité d'un avertissement préalable. Espérons que l'avenir permettra d'en réaliser un autre, mais n'allons pas trop vite. Il est à remarquer que *l'Institut de droit international*, dans la résolution à laquelle il a été fait allusion plus haut, n'a pas cru non plus pouvoir suggérer la fixation d'un délai, bien que, dans cet ordre d'idées, une assemblée de jurisconsultes puisse être moins réservée qu'une assemblée de diplomates, de militaires et de marins. Il s'est borné à dire ceci: "Les hostilités ne pourront commencer qu'après l'expiration d'un délai suffisant pour que la règle de l'avertissement préalable et non équivoque ne puisse être considérée comme éludée. (Ibid., Tome I, p. 133.)

The proposition made by the French delegation at the Second Hague Conference in 1907, as said by the *Comité d'Examen*, was based upon the resolution of the Institut de Droit International at Ghent in September, 1906, which may be translated as follows:

(1) It is in accordance with the requirements of international law, and with the spirit of loyalty which nations owe to each other in their mutual relations, as well as in the common interest of all States, that hostilities should not commence without previous and unequivocal notice.

(2) This notice may take the form of a declaration of war pure and simple, or that of an ultimatum, duly notified to the adversary by the State about to commence war.

(3) Hostilities should not begin till after the expiry of a delay sufficient to insure that the rule of previous and unequivocal notice may not be considered as evaded. (Higgins, *The Hague Peace Conferences*, p. 203.)

The Conference was mainly concerned not with the historical aspects, but rather with the expediency of introducing a regulation for the declaration of war. The Dutch delegation introduced the proposition that hostilities should not commence till 24 hours at least after an unequivocal declaration.

The Dutch proposition received the support of the Russian delegate.

Le problème d'un tel délai est étroitement lié avec la question du rapport qui existe, dans chaque pays, entre les effectifs de paix et les effectifs de guerre. C'est donc, par conséquent, une question de réduction de dépenses plus ou moins considérable. Le temps n'est peut-être pas si éloigné où nous pourrions distinguer entre les effectifs et les préparations de guerre, que chaque pays, en pleine souveraineté de sa décision, juge conformes à sa situation politique et ceux qu'il est obligé de maintenir, uniquement en vue de la nécessité d'être à tout instant sur le qui-vive. En établissant un certain délai entre la rupture des relations de paix et le commencement des hostilités, nous donnerions au pays le moyen, à qui le couvrirait, de réaliser certaines économies pendant les périodes de paix. Ces économies seraient incontestablement bienfaisantes, de part et d'autre, et ne seraient pas sans apporter une grande détente dans l'état de la paix armée, détente d'autant plus facile à accepter qu'elle ne toucherait en rien au droit de chaque nation d'établir ses armements et ses effectifs uniquement d'après ses propres vues et nécessités.

Le délai dont il s'agit aurait encore un autre avantage: il donnerait aux Puissances amies et neutres un temps précieux que celles-ci pourraient employer à faire des efforts de réconciliation, à persuader les nations en litige de porter leurs différends même ici devant la Haute Cour d'arbitrage. Mais, en parlant de délai, il ne nous faut pas perdre de vue, cependant, les possibilités présentes. L'idée d'un délai considérable n'est pas encore mûre dans la conscience des peuples. Peut-être serait-il utile, par conséquent, de ne pas aller dans nos désirs trop loin; de ne pas dépasser à l'heure actuelle les possibilités réelles d'aujourd'hui. Bornons-nous donc à accepter le délai de 24 heures proposé par la Délégation des Pays-Bas. Laissons à demain l'œuvre de demain en exprimant seulement un vœu pour l'avenir d'un délai plus grand, plus bienfaisant. (Deuxième Conférence Internationale de la Paix, Tome I, p. 133.)

The discussions in the Conference resulted in agreement upon the following:

Art. 1. The Contracting Powers recognize that hostilities between them must not commence without a previous and unequivocal notice which shall have either the form of a declaration of war with reasons or an ultimatum with a conditional declaration of war.

Thus there was established a rule requiring a declaration of war previous to the opening of hostilities, but not fixing the time which should elapse between the decla-

ration and the opening of operations. It was, however, argued that neutrals should not be held responsible until notified of the existence of war.

The report of the committee particularly concerned with the drafting of this Convention said:

D'après l'article 2 de la proposition de la Délégation française, "l'état de guerre devra être notifié sans retard aux Puissances neutres." En effet, la guerre ne modifie pas seulement les rapports entre les belligérants, elle influe gravement sur la situation des Etats neutres et de leurs ressortissants; il importe dès lors qu'ils soient prévenus le plus tôt possible. Aujourd'hui, avec la divulgation rapide des nouvelles, il n'est guère à supposer que l'on tarde beaucoup à connaître dans le monde entier l'existence d'une guerre ayant éclaté sur un point quelconque du globe et qu'un Etat puisse invoquer son ignorance de l'état de guerre pour se soustraire à toute responsabilité. Mais, enfin, il peut arriver que, malgré les télégraphes terrestres ou sous-marins et la radiotélégraphie, la nouvelle ne parvienne pas d'elle-même aux intéressés; il y a donc des précautions à prendre. D'une part, la Délégation de Belgique avait proposé l'amendement suivant: "*L'état de guerre devra être notifié aux Puissances neutres. Cette notification, qui pourra être faite même par voie télégraphique, ne produira effet à leur égard que 48 heures après sa réception.*" (Vol. III, Deux. Com., Annexe 21.) D'autre part, la Délégation britannique, dans un article faisant partie d'une proposition soumise à la Troisième Commission et renvoyé à votre Sous-Commission, disait: "*Un Etat neutre n'est tenu de prendre des mesures pour préserver sa neutralité que lorsqu'il aura reçu d'un des belligérants un avis du commencement de la guerre.*" (Vol. III, Trois. Com., Annexe 44.)

L'amendement belge, qui n'avait en vue que de mettre les Etats neutres en mesure de remplir leurs obligations, mais qui, pris à la lettre, aurait pu être interprété autrement, a été modifié; même sous sa forme nouvelle, il n'a pas obtenu l'approbation de la Commission.

L'opinion qui a prévalu est qu'il n'y avait pas lieu de fixer de délai. L'idée maîtresse est très simple. Un Etat ne peut être tenu de remplir les devoirs de la neutralité que lorsqu'il connaît l'état de guerre qui fait précisément naître ces devoirs. Dès qu'il en est informé, peu importe par quel moyen, pourvu qu'il n'y ait aucun doute à cet égard, il ne peut rien faire de contraire à la neutralité. Est-il en même temps tenu d'empêcher les actes contraires à la neutralité qui pourraient être commis sur son territoire? L'obligation suppose la possibilité de la remplir. Ce que l'on peut demander au Gouvernement neutre, c'est de prendre sans retard les mesures nécessaires. Le délai dans lequel les mesures pourront être prises variera naturellement suivant les circonstances, l'étendue du territoire, la facilité des communications. Le délai de 48 heures qui était proposé pourrait être, selon les cas, trop long ou trop court. Il n'y a pas à établir de présomption légale de

responsabilité ou d'irresponsabilité. C'est une question de fait qui le plus souvent sera résolue assez aisément.

La Sous-Commission s'est donc bornée à adopter la rédaction suivante:

"L'état de guerre devra être notifié sans retard aux puissances neutres et ne produira effet à leur égard qu'après réception d'une notification qui pourra être faite même par voie télégraphique."

Au Comité d'Examen, on a fait remarquer que la règle ainsi posée est trop absolue, puisqu'elle supposerait qu'un Gouvernement neutre, qui, par suite de telle ou telle circonstance, n'aurait pas reçu la notification prévue, mais qui cependant aurait, sans doute aucun, connu l'état de guerre, peut se dégager de toute responsabilité à raison de ses actes, en se fondant simplement sur l'absence de notification. L'essentiel n'est-il pas qu'un Gouvernement connaisse l'état de guerre pour prendre les mesures nécessaires? La preuve est facile dans le cas d'une notification; s'il n'y a pas eu de notification, le belligérant qui se plaint d'une violation de neutralité doit prouver nettement que l'état de guerre était certainement connu dans le pays où se sont passés les actes incriminés.

Après discussion, la majorité du Comité a décidé d'ajouter la phrase suivante:

"Il est du reste entendu que les Puissances neutres ne pourraient invoquer l'absence de notification s'il était établi d'une manière non douteuse qu'en fait elles connaissaient l'état de guerre."

Ce texte, accepté par la Commission, semble tenir suffisamment compte des intérêts en présence. (Ibid., p. 134.)

With the substitution of the word "Toutefois" for the clause "Il est du reste entendu que" this formula was adopted by the Conference.

Report of American delegation.—The American delegates to the Second Hague Conference, in reporting to the Secretary of State, said, regarding the Convention Relative to the Opening of Hostilities:

The convention is very short, and is based upon the principle that neither belligerent should be taken by surprise, and that the neutral shall not be bound to the performance of neutral duties until it has received notification, even if only by telegram, of the outbreak of war. The means of notification is considered unimportant, for if the neutral knows, through whatever means or whatever channels, of the existence of war, it can not claim a formal notification from the belligerents before being taxed with neutral obligations. While the importance of the convention to prospective belligerents may be open to doubt, it is clear that it does safeguard in a very high degree the rights of neutrals, and specifies authoritatively the exact moment when the duty of neutrality begins. It is for this reason that the American delegation supported the project and signed the convention. (60th Congress, 1st Sess., S. Doc. 444, p. 34.)

Commencement of hostilities after declaration.—It is recognized by this Hague Convention “that hostilities between Contracting Powers must not commence without previous and unequivocal notice.” The period of time which must elapse is not prescribed, and the proposition to make it at least 24 hours was not accepted. Therefore, in strict conformity with the law of this Convention, the declaration could be made at as short a time previous to the opening of hostilities as suited the convenience of the belligerent.

It is also evident that this Convention is operative only among States which have become parties to it. (Before 1910 this Convention had been signed by all the States represented at The Hague in 1907, except China and Nicaragua.) The Convention being binding between States only is not necessarily applicable in time of civil war or similar hostilities.

Prof. Westlake maintains that under certain circumstances the commencement of hostilities without a preceding declaration “is left possible by the fact that the parties are not made to contract that they will not commence hostilities against one another otherwise than is described, but recognize that hostilities ought not (*ne doivent pas*) to be otherwise commenced.” (International Law, Pt. II, War, p. 267.) If this interpretation of the French is admitted, it is evident that the purpose of the Convention was, as the preamble says, to prevent the “commencement of hostilities without previous notice.” It would seem, however, if the Convention has been signed in good faith, as must be acknowledged, *ne doivent pas* becomes obligatory and lays a prohibition on the Contracting Powers to refrain from commencement of hostilities till after notice or declaration.

A much more difficult question arises when it is asked what constitutes the commencement of hostilities. It is an undoubted fact that the first shot fired by order of the State might be regarded as the opening of hostilities; similarly, a proclamation of blockade or other like act of the State might be so regarded. The Constitution of the United States provides that Congress shall have power “to declare war.” (Art. I, sec. 8, 11.)

In case of an ultimatum, with a conditional declaration of war, the conditional provision gains importance.

Commencement of Spanish-American War.—In 1899 Mr. Chief Justice Fuller said of the Spanish merchant steamer *Pedro*:

When, on the 22d day of April, this Spanish steamer sailed from Havana, the United States and Spain were at war. Congress had adopted a resolution, April 20, demanding "that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters," and directing and empowering the President "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect." Time was given by the Executive until April 23 for Spain to signify compliance with the demand, but the Spanish Government at once, on April 21, recognized the resolution as "an evident declaration of war," and diplomatic relations were broken off. Blockade had been proclaimed April 22, and put into effective operation at Havana, and, immediately thereupon, elsewhere, under the proclamation. And by the act of Congress of April 25 it was declared that war had existed since the 21st day of April. (*The Pedro*, 175 U. S. Supreme Court Reports, p. 354.)

This was in accord with the general opinion in regard to the relation of declaration of war to the opening of hostilities as summarized by Prof. Moore in 1906.

It is universally admitted that a formal declaration is not necessary to constitute a state of war. From this principle, however, an unnecessary and perhaps unwarranted inference is often drawn, namely, that a nation may lawfully or properly begin a war at any time and under any circumstances, with or without notice, in its own absolute discretion. Such a theory would seem to be altogether inadmissible. Although a contest by force between nations may, no matter how it may have been begun, constitute a state of war, it by no means follows that nations, in precipitating such a condition of things, are not bound by any principles of honor or good faith. If, for example, a nation, wishing to absorb another, or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow, but it could not be said that the principles of honor and good faith enjoined by the law of nations had not been violated. In other words, to admit that a state of war exists is by no means to justify the mode by which it was brought about or begun. Nor is the practice of fraud and deceit permitted by a state of war supposed to be admissible in time of peace. (7 Moore, *International Law Digest*, p. 171.)

Commencement of Russo-Japanese War.—During the Russo-Japanese War in 1904 the question arose as to what action really constituted the opening of hostilities. In the case of the Russian steamship *Argun* which was captured on the 7th of February, 1904, at about 4 p. m., and condemned by the Sasebo Prize Court the plea was entered that the capture was made before the opening of hostilities as follows:

(1) It is a rule in international law that the state of war begins with the opening of actual hostilities. The ship under consideration was captured on the day before the sea fight off Port Arthur; that is, before the opening of actual hostilities. She ought, therefore, to be released. (Takahashi, *International Law Applied to the Russo-Japanese War*, p. 574.)

Other pleas were also entered against the legality of the capture.

After due consideration the Court concludes as follows:

When diplomatic negotiations concerning the Manchurian and Korean questions were going on between Japan and Russia, the latter country unreasonably failed to give her answer to Japan. On the other hand, she showed great activity in her army and navy, sent her land forces to Manchuria and Korea, collected her war vessels at Port Arthur, and thus showed her determination to fight. This fact was clear.

Whereupon Japan, on the 5th of the second month of the thirty-seventh year of Meiji, notified Russia that all diplomatic relations were at an end.

At the same time Japan made preparations for action and the next day, the 6th, at 7 a. m., her fleet left Sasebo with the object of attacking the Russian fleet. Inferring from the conduct of the navies of both countries and from the state of things at the time, hostile operations were publicly opened prior to the capture of the steamship now under consideration. And as it is thus clear that a state of war had begun before the time of the ship's capture, there is no need to discuss whether it was made before the declaration of war or not. (*Ibid.*, p. 575.)

On protest against the decision of this Court, the Higher Prize Court at Tokyo sustained the decision of the prize court of first instance. The decision of the Higher Prize Court is explained as follows:

In (1) of the protest the advocate argues that the state of war commences with the opening of actual hostilities, and as hostilities actually opened between Japan and Russia on the 8th of the second month of the thirty-seventh year of Meiji, the ship ought not be confiscated. But the commencement of the state of war does not necessarily lie at

the moment when two armed forces open fire upon each other, but rather at the time when the intention of making war is made public; that is to say, at the time when such intention is carried into effect, or when by a declaration of war or otherwise any such notification is made. And as the intention of making war had been publicly announced on the 6th of the second month of the thirty-seventh year of Meiji, before the battle was fought at Port Arthur on the 8th, the state of war already existed on the 7th; and the argument of the advocate that the war commenced on the 8th has no ground. (Ibid., p. 577.)

In referring to the capture of the Russian Volunteer Fleet Company's steamship *Ekaterinoslav* which was made about 9 o'clock on the morning of February 6, 1904, the Higher Prize Court said in regard to the protest against the decision of the lower court:

The state of war does not necessarily begin at the moment when the two opposing armed forces open fire upon each other, but rather when the intention of making war is made public; that is to say, when the intention is carried into action, or when a declaration of war or any such notification is made. When diplomatic negotiations were going on between Japan and Russia concerning the independence and territorial integrity of China and Korea, the Russian unreasonableness put an amicable settlement beyond hope. And when it became very clear that Russia intended to force Japan to submission by force of arms, the Japanese Government ordered its diplomatic agent at St. Petersburg on the 5th day of the 2d month of the 37th year of Meiji to notify the Russian Government that diplomatic relations between the two countries were at an end. At the same time the imperial fleet made preparations for war and left Sasebo the next day, the 6th, at 7 a. m., with the object of opening hostilities. On the way the fleet captured the ship under consideration, which was liable to naval service in time of war. This (i. e., the sailing of the fleet) was nothing more than putting the intention into action, and the Russo-Japanese War must be said to have been opened from that moment. Thus the state of war existed on the 6th day of the 2d month of the 37th year of Meiji; that is, the day on which the Japanese man-of-war *Saiyō* captured the ship under consideration. (Ibid., p. 590.)

If this case had arisen subsequent to the agreement upon the Hague Convention of 1907 relative to the Commencement of Hostilities, in which "the Contracting Powers recognize that hostilities between them must not commence without a previous and unequivocal notice," the declaration should have preceded the departure of the fleet from Sasebo at 7 a. m. on the morning of February 6, 1904.

If the sailing of a fleet "with the object of opening hostilities" constitutes a state of war, there may be consequences of far-reaching significance to naval powers in this Hague Convention. If the Russo-Japanese troubles had been deferred till 1908 and a Russian fleet had sailed from St. Petersburg with the intention of attacking the Japanese fleet at Sasebo, would it have been necessary in order that Russia might not be accused of bad faith that the Russian authorities should have made a previous declaration of war, thus giving to Japan the advantage of weeks of preparation?

If the sailing of the Russian fleet, as above, constituted a state of war, Russia, by Article 2 of the Hague Convention would have been under obligation to notify "neutral Powers without delay;" otherwise such Powers might be subject to the necessity of proving that they were unaware of the state of war.

After considering cases Prof. Takahashi says, "On the whole, the author's view is that the Russo-Japanese war was commenced by the capture of the *Ekaterinoslav*, as she was liable to be appropriated for naval service during the war." (Ibid, p. 25.)

While the Convention relative to the Opening of Hostilities would probably give rise to few, if any, questions in case of war on land, it would seem necessary to determine what constitutes the commencement of hostilities upon the sea in order that the contracting powers may not be accused of bad faith.

Application of principles to Situation II.—In spite of the previous ultimatum of the United States, it would seem that the United States could consider that a state of war exists between July 7 and 10.

This situation is not expressly covered by the Hague Convention Relative to the Opening of Hostilities.

There is, however, nothing in international law which prevents State X from issuing a subsequent ultimatum to take effect at a date earlier than that named by the United States.

Since State X has then the power of declaring war against the United States before July 10, it could hardly

be consistently argued that the United States has tied its own hands from all offensive or defensive warfare until July 10, if war is declared by X before that date.

Reasons of fairness and of necessity demand that we find by implication in the United States ultimatum an intention of postponing war till July 10, *if X does not sooner declare war against the United States*. If X declares war prior to the 10th, then for the purposes of the United States war dates from this prior date.

This same result is practically reached by Dr. Stowell when he says in discussing an interval before the opening of hostilities—

When one State declares war against another, giving an interval before the opening of hostilities, it goes without saying that the State against which war is declared may in turn declare war at once, or it may allow a shorter interval before the commencing of hostilities. But what if it make no rejoinder—may it begin hostilities at the expiration of the interval? Yes; because if attacked it would certainly defend itself, and the measures of defense necessary to its security must in some instances go to the extent of attacking the declaring State. (*American Journal of Int. Law*, vol. 2, No. 1, p. 56.)

Effect of the declarations of the United States and State X.—Considering the Hague Convention of 1907 as operative unless there is evidence or a statement to the contrary, these declarations by the United States and State X may be considered to be made under the provisions of the Convention relative to the Opening of Hostilities.

In accordance with the ultimatum of the United States war would exist from July 10 unless certain demands are satisfied before that date. These demands are not satisfied; therefore there would be no doubt as to the existence of war from July 10.

State X announces that war will be declared on July 7 unless the United States withdraws its demands before that date.

These acts of the United States and State X may properly be regarded as ultimatums with conditional declarations of war conforming to the requirements of the Hague convention.

In order that war may exist by declaration it is not necessary that both parties should make declaration.

War may exist by declaration on one side. State X has announced that it would make such a declaration for July 7 if the United States did not take certain action. This action the United States did not take. No statement is made as to whether State X did, as it announced it would do, declare war on July 7. However, in the absence of any withdrawal of the demand, it would be legitimate for the United States to consider the action of State X as a declaration of war and to regard a state of war as existing from July 7 in accord with the announcement of State X.

Attitude of the commander.—The commander of the United States war vessel knows only that the demands of neither the United States nor of State X have been modified. He may accordingly regard a state of war as existing between the United States and State X from July 7. It would be only in accord with proper interpretation of the statement of State X to accept July 7 as the date of the beginning of the war. For the commander, therefore, war between the United States and State X would exist on July 8, when he meets the merchant vessel of State Y loaded with coal and bound for a port of State X. He would first have to consider what is the status of the coal under the conditions and then must consider what is the status of the vessel under the conditions.

Status of the merchant vessel if sailing with knowledge of war.—If the merchant vessel had sailed with knowledge of the existence of war between the United States and State X she would be liable to capture by the war vessel of the United States as bound to a hostile destination with a cargo which under the conditions would presumably be contraband. The evidence would certainly be sufficient to justify the commander in sending the vessel to a prize court. In forming his decision to take such action, he could be reasonably certain that he could act without making his State liable to damages if the merchant vessel knew of the existence of war.

Status of the merchant vessel if sailing without knowledge of the war.—If the merchant vessel had sailed before July 1 and had no knowledge of the prospect of hostilities, the

vessel could not have sailed for a belligerent destination, as at that time the port of State X was not the port of a belligerent. Accordingly the cargo would not at the beginning of the voyage be contraband, but in the highest degree innocent.

If the vessel had sailed after July 1 and before July 7 with a knowledge of the strained relations and of the action of one or of both the States, it might be without guilty intent, for the strained relations might not result in war, as both declarations were conditional. The merchant vessel of a neutral State Y could not be presumed to know whether or not the conditions had been met. Until July 7 the destination would be peaceful and cargo innocent. If war existed from that date the destination might be belligerent, and the question would arise as to whether the cargo would be liable, as it would in case it had been shipped for a belligerent destination. A neutral ship is entitled to knowledge of the existence of blockade before incurring any penalty. It would seem that a neutral vessel would similarly be entitled to know of the existence of war before she would be liable for the carriage of contraband and before the articles of the nature of contraband could be condemned as contraband. The commander should therefore exercise more caution in sending in such a vessel. It will also be expedient to have regard to treaty provisions in respect to the treatment of contraband. Such provisions as Article 10 of the treaty of the United States with Sweden of April 3, 1783, might apply.

ART. 10. These which follow shall not be reckoned in the number of prohibited goods—that is to say, all sorts of cloths and all other manufactures of wool, flax, silk, cotton, or any other materials, all kinds of wearing apparel, together with the things of which they are commonly made; gold, silver, coined or uncoined, brass, iron, lead, copper, latten, coals, wheat, barley, and all sorts of corn or pulse, tobacco, all kinds of spices, salted and smoked flesh, salted fish, cheese, butter, beer, oyl, wines, sugar, all sorts of salt and provisions which serve for the nourishment and sustenance of man; all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sailcloth, anchors, and any parts of anchors, ship masts, planks, boards, beams, and all sorts of trees and other things proper for building or repairing ships. Nor shall any goods be considered as contraband which have not been worked into the

form of any instrument or thing for the purpose of war by land or by sea, much less such as have been prepared or wrought up for any other use. All which shall be reckoned free goods, as likewise all other, which are not comprehended and particularly mentioned in the foregoing article; so that they shall not, by any pretended interpretation, be comprehended among prohibited or contraband goods. On the contrary, they may be freely transported by the subjects of the King and of the United States, even to places belonging to an enemy, such places only excepted as are besieged, blocked, or invested, and those places only shall be considered as such which are nearly surrounded by one of the belligerent powers.

This treaty also contains in Article 15 a statement in regard to the liability of commanding officers—

And that more effectual care may be taken for the security of the two contracting parties, that they suffer no prejudice by the men of war of the other party or by privateers, all captains and commanders of ships of His Swedish Majesty and of the United States and all their subjects shall be forbidden to do any injury or damage to those of the other party, and if they act to the contrary, having been found guilty on examination by their proper judges they shall be bound to make satisfaction for all damages and the interest thereof and to make them good under pain and obligation of their persons and goods.

Notification to neutrals of the existence of war.—There is a provision in the Hague Convention of 1907 relative to the Opening of Hostilities to the effect that—

The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, can not rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

Prof. Moore cites a report of the Argentine Supreme Court:

In February, 1865, a British subject shipped from Liverpool to his agent in Buenos Ayres a quantity of rifles, with a view to their sale in Paraguay. After the arrival of the goods at Buenos Ayres such a sale was negotiated, and the rifles were shipped from Buenos Ayres on April 8, 1865, for Corrientes, Argentine Republic, where they were to be transshipped for Paraguay. On April 14 war broke out between the Argentine Republic and Paraguay, and the steamer on which the rifles were transported was stopped by the governor of Corrientes, who took out the rifles and placed them at the disposal of the Argentine Government. The owner subsequently presented a claim for the value of the rifles, as well as for an indemnity of about a fourth of their

value for their detention for 18 months. Their value he estimated by the price which they would have fetched in Paraguay. A suit was brought in the federal court at Buenos Ayres, which held that the rifles could not be lawfully confiscated, and that they should be returned to the owner or that a just equivalent should be paid to him or his representative. From this decision the Argentine Government appealed to the supreme court, which decided that, as the arms were shipped by the owner before the declaration of war, they were not subject to confiscation; that their taking by the Argentine Republic was to be considered as an act of expropriation for public use, and not as an act of préemption under the law of nations; that according to the law of expropriation the price to be paid was what the goods were worth in place where they were taken; and that, as the Government had in detaining the arms exercised a legitimate right, from which no obligation to pay indemnity could arise, the Government should pay only the current rate of interest on the value of the arms from the date of their expropriation. (7 Moore Int. Law Digest, p. 747.)

Résumé.—From the conditions and regarding principles and international conventions and agreements and such precedents as may be applicable, it would seem that the merchant vessel of neutral State Y loaded with coal should be treated with caution if she had sailed without knowledge of the existence of war, as might easily be the case if she was met on July 8, as stated in the situation. According to the precedent from the Argentine court the goods seized under such circumstances would be liable to expropriation rather than condemnation as prize.

SOLUTION.

Unless exempt by treaty or otherwise the commander should send the merchant vessel of State Y to a prize court on the ground that the cargo was contraband of war if the vessel sailed with knowledge of the existence of the war.

If the vessel clearly had no knowledge of the existence of the war, he should consider that the cargo will probably be liable to expropriation rather than condemnation.